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No. 84-25

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

WALTER GILBERTSON and CHARLES L. MILLER,

Petitioners,

vs.

JOHN M. BEVER, et al.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED[1]

1. Whether the district court's denial of petitioner's claims of qualified immunity, which is purely a question of law, is immediately appealable under the collateral order exception to 28 U.S.C. § 1291 enunciated in Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949).

2. Whether the prohibitions set forth in Elrod v. Burns, 427 U.S. 347 (1976) clearly established rights applicable to a reduction in force in a public work force so that petitioners' immunity claim can be determined under the test enunciated in Harlow v. Fitzgerald, 457 U.S. 800 (1982).

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[1]Pursuant to Rule 21.1(b) of the Rules of this Court, the following is a complete list of the parties in the underlying proceedings (identified as Plaintiffs or Defendants in the District Court, and as appellants or appellees in the Court of Appeals):

Plaintiffs/appellees. . John M. Bever, Clearyl Davis, John E. Ellifritt, Cecil Fling, Francis D. Radcliff, Robert W. Robinson, Michael Shepherd, Larry Williams and Larry W. Griffin,

Defendants/appellants . . John D. Rockefeller, IV., Walter Gilbertson and Charles L. Miller,

Defendants. . John Gum and Wilton Williams.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Walter Gilbertson and Charles L. Miller, petitioners, hereby petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra 1A - 43A) is reported at 724 F.2d 1083; however, the order denying petitioners' request for a rehearing with suggestion for rehearing en banc on an equal division of the participating judges (App. 83A - 86A) is not yet officially reported. The district court's opinion denying petitioners' motion for summary judgment (App. 44A - 82A) is unpublished.

JURISDICTION

The district court's order denying petitioners' motion for summary judgment was entered on July 22, 1983 and was timely appealed to the United States Court of Appeals for the Fourth Circuit. By its opinion dated January 11, 1984, the court of appeals dismissed the appeal for lack of jurisdiction as it asserted that the district court's ruling on petitioners' motion for summary judgment was a collateral order not within the exceptions set forth in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1948).

Petitioners' motion for rehearing, which was supported by the United States which filed an amicus curiae brief, was thereafter denied on April 5, 1984, by an equal division of the regular active voting judges. The jurisdiction of this Court to review this case is invoked

under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The issue of appealability involved 28 U.S.C. § 1291. Respondent's claims, against which petitioner asserts qualified immunity, are brought under 42 U.S.C. §§ 1983 and 1985 and are based upon the First, Ninth and Fourteenth Amendments. The texts of these Constitutional and statutory provisions are reprinted in Appendix 87A - 88A, infra.

STATEMENT OF THE CASE

This Court, recognizing the harm imposed upon government and its employees from unwarranted civil actions seeking damages individually from government officials, acting in their official capacities, reformulated the test for the qualified immunity defense in Harlow v.

Fitzgerald, 457 U.S. 800 (1982). This Court determined that, as a means of preventing trials unnecessarily when such claims are insubstantial, that the government official's entitlement to qualified immunity be resolved as a threshold matter on objective facts.

The critical issue presented for review in this case is whether the district court's pre-trial denial of a Harlow qualified immunity claim should be appealable before trial on the merits when no unresolved factual issues exist under the collateral order exception to 28 U.S.C. § 1291.

A. Factual Overview to Respondents' Claims.

In this case, three high ranking state officials, the Governor, the Commissioner of the Department of Highways and a District Engineer, with responsibility for a six county district,

have been sued for damages in their individual capacities by nine dismissed state highway employees from Doddridge County.[2] This case involved a 1981 statewide reduction in force in the Department of Highways of over 1500 persons which included the layoff of thirteen of forty-three employees in the Doddridge County unit. Three of the respondents were terminated from employment in February, 1981. The remaining six respondents were terminated from their employment in June, 1981. This case is one of nine cases currently

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[2]There are two other defendants, neither of whom has applied for immunity, who are not petitioners in this action. One is the official who selected those employees for termination, John Gum, County Supervisor of the West Virginia Department of Highways for Doddridge County. The other is Wilton Williams, the Chairman of the Doddridge County Democratic Executive Committee. An injunctive claim for restoration to the previously held employment is included in this case.

pending in Federal District Courts in West Virginia against the Governor, the petitioners and other state officials. All these cases involve the same reduction in force and all involve claims by former employees of the Department of Highways that their individual terminations under this reduction in force, were politically motivated and based solely on their political affiliation.

The respondents here claim that they are Republicans and Independents and were terminated solely on the basis of their political affiliation in violation of 42 U.S.C. §§ 1983 and 1985, and contrary to this Court's holdings in Elrod v. Burns, 427 U.S. 347 (1976), and Branti v. Finkel, 445 U.S. 507 (1980). The petitioners, through affidavits submitted to the district court which were not contested by respondents, established

that they were not personally involved in the dismissal of the respondents.

Based on this uncontroverted record, these petitioners sought qualified immunity as mandated by this Court's decision in Harlow v. Fitzgerald, supra, prior to being subjected to trial on respondents' claims for damages. Petitioners asserted that their actions do not fall within the prohibitions of Elrod, supra, and do not violate any clearly established rights of respondents. The petitioners' motion for summary judgment on a claim of qualified immunity was denied by the district court.

B. The Petitioners' Involvement In Respondents' Terminations.

In late 1980 and into 1981, the petitioner, Commissioner Miller, advised the Governor on several different occasions that the Department of Highways

faced an imminent serious fiscal crisis resulting from a shortfall in revenue collections, reductions of highway funds from the federal government and insufficient legislative appropriations to the Department. After reductions in expenditures were imposed, including cutbacks in equipment purchases and suspension of routine maintenance, a layoff of employees was ordered. A total of 1531 employees were eliminated in several reductions in force that occurred in 1981.

The petitioner, Commissioner Miller, ordered the various units of the Department, including the fifty-five county units, six districts, twenty divisions and central office staff, to initiate and implement the reduction in force. The various units, including District Four supervised by petitioner Gilbertson, were directed to make the

reductions across all units and levels of employees so as to maintain a balanced work force. As a result of this action, by a 1983 reduction in force and by normal attrition, the Department's work force has been reduced from over 7900 employees in 1979 to 5274 employees at present.

In Doddridge County, which was one of six counties supervised by petitioner Gilbertson, thirteen men out of a work force of forty-three were selected for layoff in this reduction in force. The selection of the respondents and others in Doddridge County was solely performed by John Gum, the County Supervisor and respondents' immediate supervisor, and petitioner Gilbertson relied upon Gum's selections as being within the established criteria of the maintenance of a balanced work force. The record is clear on these facts. The respondents do

not dispute the necessity of the 1981 reduction in force. They do not contradict the petitioners' assertion that John Gum selected them for termination in 1981. All the respondents question in this case is whether they, individually, were selected for their political affiliation once the decision to reduce the Department of Highways' work force was implemented.

The facts are uncontradicted that at the time Supervisor Gum was entrusted with the task of making this decision, he was thoroughly familiar with the constitutional prohibition against termination of public employees on the basis of their political affiliation. The petitioner, Commissioner Miller, pursuant to directions from the Governor in 1977, undertook to educate his staff and employees on the prohibitions against political discrimination in public

employment as established by Elrod. This educational process included meetings with district engineers and county supervisors, including Gilbertson and Gum. Petitioner Gilbertson participated in this educational process by relaying this information to his employees as well.

The petitioner, Commissioner Miller, other than to order this reduction in force and establish the selection criteria, had nothing whatsoever to do with the selection of respondents. He did not know respondents or their political affiliation. Nor did he suggest or direct that the selections be made based upon political affiliation or beliefs. With respect to petitioner Gilbertson and his participation in the selection process for the reduction in force, it is uncontradicted that he did not select respondents, that he was

unaware of all or most of their political affiliations or beliefs and that he did not suggest or direct that selections be made based upon political affiliations or beliefs. At most, he signed form letters advising respondents of their terminations. Neither of these petitioners had respondents complain or object to them after the 1981 reduction in force that the selection process was politically motivated.

C. The Denial of Petitioners' Claims of Qualified Immunity.

After extensive discovery, and based on a record which showed petitioners' only participation in respondents' terminations were the activities heretofore described, petitioners moved for summary judgment on the ground that their actions did not violate any clearly established rights of respondents and that petitioners were accordingly

entitled to qualified immunity. As part of this motion, petitioners argued that because their actions with regard to respondents' terminations were grounded on an independent legitimate justification, i.e., a fiscally-mandated reduction in force, that respondeat superior had not application for liability here, and it could not be said that petitioners had abridged in any way the constitutional rights of these respondents not to be terminated based solely upon their political beliefs.

On July 21, 1983, the district court denied petitoners' motion for summary judgment, finding that the constitutional rights of these respondents were in fact "clearly established" at the time of respondents' terminations. The district court further concluded that petitioners' claims of good faith were inappropriate for summary judgment since respondents'

allegations were sufficient to create genuine issues of material fact precluding summary judgment. The dissenting opinion below found that: "The district court's holding is incompatible with Rule 56 and mandates trial where there are mere allegations of politically motivated terminations" 724 F. 2d 1092. The district court seemed determined to find factual disputes so as to deny petitioners' motion.

Petitioners thereafter appealed the district court's rejection of the qualified immunity defense and were granted an emergency stay of trial by a single judge of the court of appeals who determined that there were "no unresolved genuine and material factual disputes" with respect to the qualified immunity defense. However, on October 7, 1983, a three judge panel of the court of appeals vacated the stay of trial and on January

11, 1984, the court of appeals, in a divided opinion, dismissed petitioners' appeal for lack of jurisdiction on the basis that the denial of petitioners' motion for summary judgment was a collateral order not within the exceptions set forth in Cohen v. Beneficial Industrial Loan Corp., supra.

The court of appeals rejected the petitioners' appeal on the jurisdictional issue. The court found that the qualified immunity claim was not a matter appealable from a final decision and did not require interlocutory appeals as an absolute immunity claim would. The court also found that a determination of the qualified immunity claim would not terminate the litigation on the basis that the injunctive relief requested could not be defended with a qualified immunity defense. Finally, the court of appeals held that this appeal did not

present a serious and unsettled question of law as the question of selective discharges of low level public employees on the basis of political affiliation was not unsettled.

The dissent was vociferous in its disagreement with the majority opinion. That dissent stated:

> "In my view, the district court's order, denying appellant's claims of qualified immunity, is precisely the type of preliminary ruling which necessitates immediate appellate review" (Emphasis added) 724 F. 2d 1089.

The dissenting opinion flatly states that in Harlow and the companion case of Nixon v. Fitzgerald, 457 U.S. 731 (1982), this Court recognized that the collateral order doctrine applies to both absolute and qualified immunity claims. If that interpretation is accurate, then the court of appeals has improperly decided this appeal.

The dissenting opinion states that if ever there was a case for the application of Harlow, this case is it. Judge Hall also discounted the simplistic injunctive relief argument of the majority and found that the Elrod case was not just clear as to these particular circumstances. Judge Hall also found the claims of respondents were insubstantial on the uncontradicted record in this case.

REASONS FOR ALLOWANCE OF THE WRIT

This case warrants review by this Court to resolve conflicting rulings among the lower courts that now threaten to undermine the defense of qualified immunity for public officials which this court took such great efforts to reformulate in Harlow to permit more claims of qualified immunity to be resolved on motions for summary judgment before trial.

The real issue presented here is whether a qualified immunity defense can provide the protection intended by Harlow if insulated from pre-trial appellate review. In this case, despite at least one judge's recognition of the insubstantiality of the claim against these petitioners, and contrary to decisions of both this Court and other courts of appeals, these petitioners are now faced with trial as a result of the court of appeal's decision to dismiss as a non-applicable interlocutory order the petitioners' appeal from the denial of their immunity claims.

A second question here involves the immunity standard which relies upon a finding of whether the public official's actions, or failure to act, have implicated "clearly established rights" of the plaintiffs. The federal courts' decisions are in confusion over this

question or at least in need of clarification. Such disputes over the meaning of Elrod have been demonstrated in decisions of this very court of appeals. Ramey v. Harber, 589 F. 2d 753 (4th Cir. 1978); Delong v. United States, 621 F. 2d 618 (4th Cir. 1980).

I. The Denial of Petitioners' Qualified Immunity Claim Was Appealable Under the Cohen Doctrine For Appealability of a Collateral Order.

If this case had arisen in the District of Columbia or Eighth Circuit, the petitioners' claims of qualified immunity would have been heard by the court of appeals. In Evans v. Dillahanty, 711 F. 2d 828 (8th Cir. 1983), the court held that absolute and qualified immunity claims are immediately appealable if the facts are not in dispute and the determination is solely a question of law. That is the case here. In McSurely v. McClellan, 697 F. 2d 309

(D.C. Cir. 1982), the court found that appellate review of denial of motions for summary judgment was available for both absolute and qualified immunity claims.

However, the court of appeals here rejected the petitioners' appeals on jurisdictional grounds. Although the majority expressed doubt that an order denying qualified immunity would ever be appealable immediately as a collateral order under Cohen v. Beneficial Industrial Loan Corp., 357 U.S. 541 (1949), it did not specifically so hold. Instead, it rejected the appeal on two technical grounds. Unfortunately, these two technical reasons will bar immediate appealability of decisions denying qualified immunity just as effectively as a blanket decision denying appealability in such cases.

The court of appeal's first basis for refusing to review petitioners'

qualified immunity claims was its conclusion that such claims are nonappealable when officials sued for damages have also been sued in their official capacities for injunctive relief, and thus will remain in the suit even if they are entitled to immunity in their personal capacities. This ruling is indefensible in that it permits clever pleaders to circumvent the Harlow shield from "insubstantial suits" for personal damages by the simple technique of adding a claim for injuctive relief.

The second rationale given by the court of appeals for dismissing the appeal in this case is that Cohen, which defines those interlocutory orders that are immediately appealable to the court of appeals under 28 U.S.C. § 1291, requires that such an order present "a serious and unsettled question". In the majority's view, the underlying issue in

this case was the ultimate legality of respondents' discharge, which could be decided by reliance on settled law. Hence the majority held that the order presented no unsettled question and was unappealable.

The protection for public officials mandated by the Supreme Court in Harlow includes protection from insubstantial lawsuits for personal damages. If the protection intended by Harlow is to be given meaning, then immediate appeals from denials of motions to dismiss or motions for summary judgment based on qualified immunity must be allowed.

The decision of this Court in Harlow involved a factual situation where the evidence against the public officials was only "inferential" after years of extensive discovery. This court insisted in Harlow that the qualified immunity standard be examined by the trial courts

so that a speedy and inexpensive resolution of "insubstantial claims" would occur without a resort to trial. As a matter of policy, the chilling effect of such lawsuits upon the willingness of responsible persons to serve in government must be thwarted. This court in Butz v. Economou, 438 U.S. 478 (1978), admonished that insubstantial lawsuits against public officials should not proceed to trial but until Harlow, the message was not clear.

That Harlow message has not been yet received by the court of appeals here. The Governor and the petitioners here and other state officials face trial after trial as a result of this decision. In Harlow, this court expressed concern over the social costs faced by public officials defending lawsuits against them which included: (1) The expense of litigation; (2) The diversion of time and

energy of public officials from public duties; (3) The deterrence of responsible persons from participation in public service; and (4) The fear that being sued would affect the unflinching discharge of official duties by public officials. The court of appeals held these factors do not apply here and speedy litigation by trial rather than appeal is the appropriate avenue.

This Court in Harlow examined both absolute and qualified immunity with respect to constitutional damage actions. In Nixon v. Fitzgerald, 457 U.S. 731 (1982), this Court held that the issue of the President's absolute immunity was an "appealable question to the court of appeals". Id at 743. This absolute immunity has been extended to judges, prosecutors, legislators and other officials who require complete protection from suit. Most governmental officials

have the lesser qualified immunity which prior to Harlow, had both objective and subjective aspects. Now the Harlow standard has made the entitlement to qualified immunity an objective standard to be determined by the objective reasonableness of the official's conduct. If that entitlement to qualified immunity under an objective standard cannot be reviewed on appeal before trial then Harlow is meaningless.

The court of appeals found that the collateral order exception has been closely confined only to situations where the claimed right would be lost or rendered impractical if immediate appellate review was not granted. The collateral order exception held the court is a narrow one and must be served only in rare cases. The court of appeals examined the elimination of the subjective aspect of the qualified

immunity claim in Harlow and agreed that this Court intended to expedite disposition of qualified immunity claims on pretrial motions but the court of appeals also stated that:

> "...but one must read much into that opinion to conclude that the Supreme Court also intended that denials of such motions should be immediately appealable" 724 F. 2d at 1088.

That holding is clearly erroneous.

The petitioners are aware that there is a reluctance to permit piecemeal appeals. In Forsyth v. Kleindiest, 729 F. 2d 267 (3rd Cir. 1984) (Forsyth II), the court interpreted Harlow as encouraging summary dispositions in insubstantial claims but not as a relaxation of the limitation on interlocutory appeals. Other pretrial matters such as discovery orders, class certification denials and refusals to disqualify counsel have been found not to

be reviewable before final judgment. Cobbledick v. United States, 309 U.S. 323 (1940), Coopers and Lybrand v. Livesay, 437 U.S. 463 (1978); Firestone Tire and Rubber Co. v. Risjord, 449 U.S. 368 (1981). Petitioners assert that this reluctance to examine pretrial rulings is misplaced on qualified immunity claims.

The point is that there is obvious contradiction and disparity between the circuit courts which must be resolved by this Court. In the Fourth Circuit, it appears that a qualified immunity claim is not effective to prevent trial on insubstantial claims but may prevent liability only. If the standard is an objective one which may be decided as a matter of law then the element of the collateral order doctrine as stated in Cohen requiring the order be "effectively unreviewable on appeal from a final judgment or so important that review

should not wait upon final judgment" is satisfied. Petitioners assert that the district court's order conclusively determined their claim of qualified immunity and thus resolved an important question independent of the subject matter of the litigation. Somehow, the court of appeals, although recognizing these elements, simply ignores them and finds that the question of qualified immunity is reviewable after final judgment. That simply is not so.

The court of appeals rejected petitioners' appeal on the grounds that: (1) the claims of qualified immunity applied to personal liability and not to injunctive claims directed at petitioners in their official capacity so a trial could not be prevented; and (2) that the case does not present a "serious and unsettled" question of law. Neither rationale justifies a circumvention of

the mandate of Harlow. It is clear in this case that the Governor and petitioner Gilbertson are not necessary for any adjudication on an injunctive claim such as reinstatement to employment. Under West Virginia law, Chapter 17, Article 2A, Section 4 of the Code of West Virginia of 1931 as amended, only the Commissioner of the Department of Highways can reinstate. In such a case, even petitioner Miller is not a necessary party at any trial as his successor could act to implement any injunctive relief granted by the court.

Professor Schuck of the Yale Law School published a study in 1980 of the effect of personal lawsuits against public officials which emphasized that such damage suits against officials, as individuals, had extremely significant detrimental effects which suits against governments or officials in their

official capacity had little negative effect. Schuck, "Suing Our Servants, The Court, Congress, and the Liability of Public Officials for Damages," 1980 S. Ct. Rev. 281. This study was cited with approval in Harlow. Chief Justice Burger in his concurring opinion in Nixon, supra, quoted Judge Hand who stated fifty-eight years ago that: "After now some dozen years of experience I must say that as a litigant I should dread a lawsuit beyond almost anything short of sickness and death." Yet the court of appeals seems unconcerned about petitioners and other officials facing trial in this case and many other cases.

It makes no sense for a court to refuse appellate review of a qualified immunity claim because the damage claim has been joined with a claim for injunctive relief against the public official in his official capacity. The

result of this mistaken approach is to submit the same official to the costs and detrimental effects of litigation of insubstantial claims that Harlow sought to avoid.

The court of appeals has ignored the reason for the collateral order doctrine. This doctrine permits the appeal of a final decision not a final judgment. In Abney v. United States, 435 U.S. 651 (1977), this Court held a pre-trial denial of a motion to dismiss the indictment on double jeopardy grounds was immediately appealable. This Court found that rights under the Double Jeopardy Clause would be significantly undermined after conviction and sentence. This Court found that the defendant contested the very authority to hale him into court to face trial. That is precisely what the petitioners do here. The court of appeals suggests that a trial may offer

just as speedy a resolution of petitioners' claims of qualified immunity as an appeal. That approach ignores the incredible expense in time, money and personal emotional strain about to be undertaken by petitioners.

The other basis set forth by the majority of the court of appeals was that this appeal did not present serious and unsettled questions of law. The majority reasoned that since the plaintiffs' right not to be discharged solely because of their political affiliation was clearly extablished, this appeal did not present a "serious and unsettled question." There is considerable judicial confusion over the prohibitions established by Elrod which will be discussed in the next section of this petition. This appeal should have been reviewed on its merits.

II. The Elrod Decision Does Not Set Out Clearly Established Constitutional Rights Applicable to a Reduction In Force In Public Employment.

In Elrod, this Court held that the First and Fourteenth Amendments to the United States Constitution were violated by the discharge of nonpolicymaking, nonconfidential government employees solely because of their political beliefs or political affiliation. This decision found three justices joining in the opinion which held patronage dismissals placed severe restrictions on freedom of political belief and association and could be justified only in extremely limited circumstances. Two justices concurred in the opinion and held that discharges solely for political affiliation or beliefs were violative of the First Amendment. The decision in Branti v. Finkel, 445 U.S. 507 (1980), followed this principle.

Do the prohibitions mandated in Elrod set out clearly established constitutional rights applicable to the

kind of employee action, a statewide reduction in force, existing in these circumstances? If those rights are clearly established then one of the requirements for immediate appellate review of a collateral order is not present here. If those rights are not clearly established then this appeal presented serious and unsettled questions of law and should have been heard by the court of appeals. In this case, the majority found that the respondents alleged party affiliation was the sole criterion for dismissal and that the uncontradicted fiscal constraints which caused the reduction in force did not present serious and unsettled questions under Elrod.

The dissenting opinion strongly disagreed and stated as follows:

> "Whether or not Elrod applied in the instant case, where a substantial portion of

> the public employment sector had to be permanently eliminated for legitimate financial reasons, is, therefore, by no means clear and settled. Except for economic necessity, all of the plaintiffs would have remained in their DOH jobs in 1981. Thus, the applicability of Elrod to the facts of this case, and the constitutional violations which plaintiffs assert, are highly questionable and at the very least justify pre-trial review by this Court under the collateral order doctrine." 724 F. 2d at 1093.

The dissent clearly pointed out that this circuit court and several others have wrestled with Elrod and uncertainty continues with respect to Elrod's scope and applicability.

In Ramey v. Harber, 589 F. 2d 753 (4th Cir. 1978), this same court of appeals stated that:

> "The district court's decision is supported by the broad sweep of the Elrod plurality, but there is considerable uncertainty as to how a majority of the Supreme Court would treat a failure to rehire

and other patronage practices."
589 F. 2d at 757.

In two other decisions, DeLong v. United States, 621 F. 2d 618 (4th Cir. 1980) and Johnson v. Bergland, 586 F. 2d 993 (4th Cir. 1978), several judges expressed concern over the interpretation of Elrod.

This unsettled state is not confined to this circuit. Judge Aldisert of the Third Circuit stated in his concurring opinion in Loughney v. Hickey, 635 F. 2d 1063 (3rd. Cir. 1980), that: "I suggest that the various opinions in both Elrod and Branti are not capable of public comprehension". In Abraham v. Pekarski, 537 F. Supp. 858 (E. D. Pa. 1982), the court observed that few decisions of this court have generated as much litigation as Elrod and Branti because of the lack of the majority opinion in Elrod.

The most recent expression of this unsettled judicial state was over the

interpretation of Elrod was in Jones v. Dodson, 727 F. 2d 1329 (4th Cir. 1984) decided only four months ago but after this case. In Jones, a claim of discharge based upon political affiliation in a sheriff's office was examined by the Fourth Circuit. In Jones, the Court held:

> "These cross-appeals raise difficult constitutional and procedural issues growing out of the claims of two public employees that they have been discharged in violation of first amendment rights. The difficulty is compounded by the fact that controlling doctrine - both substantive and procedural - is still evolving and is by no means yet authoritatively settled in all its critical aspects." 727 F. 2d at 1333.

The court of appeals here has ignored the reality of the uncertainty present in its own decisions in this case.

In 1981, more than 1500 persons were laid off from the Department of Highways

in a reduction in force necessitated by an undisputed fiscal crisis in state government. Neither petitioner here actually chose those individuals, including respondents, selected in this reduction. Neither petitioner encouraged or directed any selection process that included a factor of political affiliation. In fact, both gave directions that the selection, which was to be made by local on line supervisors who possessed the appropriate information, was to be made so as to maintain a balanced work force. Petitioners deny that the termination of respondents was based solely on political affiliation but was necessitated by a fiscal crisis. In that setting, there may be not clearly established constitutional rights. See Wren v. Jones, 635 F. 2d 1277 (7th Cir. 1980).

The issue here is whether the

petitioners' lawful acts in a fiscal crisis could violate a clearly established right of respondents not to be terminated solely for political reasons. The court of appeals in this case was unable to answer this issue unanimously and conclusively. Under Harris v. Young, 718 F. 2d 620 (4th Cir. 1983), the inability of the court to unanimously decide the qualified immunity issue is sufficient to support a holding that these petitioners are immune or allow appellate review.

CONCLUSION

The issues raised by the petition deserve review and consideration. The writ sought should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, DAVID P. CLEEK, Counsel for Petitioners, do hereby certify that three (3) true copies of the foregoing Petition for Writ of Certiorari were served upon counsel for Respondent by depositing said copies in the United States mail with first-class postage prepaid on the ____ day of July, 1984, addressed as follows:

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